

The Service Occupation Tax is a tax imposed upon servicemen engaged in the business of making sales of service in this State, based upon the tangible personal property transferred incident to sales of service. See 35 ILCS 115/3. (This is a GIL.)

October 25, 2005

Dear Xxxxx:

This letter is in response to your letter dated June 24, 2005, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

A company (called Company ABC in this letter) located in STATE will be conducting in your state one or more of the 5 transactions described below. In order to comply with your state's sales and use tax laws, it is important for Company ABC to be aware of your state's sales and use tax treatment of these transactions. Please answer the questions in this letter regarding the sales and use tax treatment of the 5 types of business transactions and the nexus questions.

I. Transaction A: Traditional Model

A. Facts:

1. Company ABC's employees visit dealers (i.e. customers) in your state and take photos of trucks and collect truck data on handheld computers. In some instances, it will take multiple photos and also move trucks to a location for taking the photos.
2. Company ABC exports the data and photos to any websites requested by the dealer.
3. Company ABC prints window labels and/or buyer's guides and applies them to the trucks if requested by the dealer.
4. Dealer has access to Company ABC's backend website (ABC.com) where the dealer can manage their inventory of trucks and internet

leads (e.g. change prices of trucks, delete trucks, provide dealer one place to read and respond to inquiries, etc.).

5. Company ABC charges the dealer \$1000 per month for these services.

B. Questions:

1. Is the charge by Company ABC to the dealer in Fact 5 subject to your state's sales or use tax?
2. In Fact 3, are Company ABC's purchases of paper on which the window labels and buyers guides are printed, exempt from your state's sales and use tax?
3. If Company ABC's only transactions in your state are as described above for Transaction A, does Company ABC have nexus in your state for (1) sales and use taxes, and (2) income taxes?

II. Transaction B: For Sale by Owner:

A. Facts:

1. For \$30, an individual in your state can post a truck on Company ABC's website for the purpose of trying to sell the truck. The individual is responsible for furnishing a photo of the truck and other information about the truck to Company ABC.
2. Company ABC mails a kit of materials to the individual in your state. Company ABC's cost of the plastic bag for containing the materials and the paper on which the information is printed is purchased by Company ABC for \$1 to \$1.50. Mailing costs are about \$1.50.

B. Questions:

1. In Fact 1, is the \$30 paid to Company ABC subject to your state's sales or use tax? Would the answer be the same if the kit of materials in Fact 2 was not furnished to the individual?
2. In Fact 2, are Company ABC's purchases of the plastic bags and paper subject to your state's sales or use tax?
3. If Company ABC's only transactions in your state are as described above for Transaction B, does Company ABC have nexus in your state for (1) sales and use taxes, and (2) income taxes?

III. Transaction C: Do-it-Yourself (DIY):

A. Facts:

1. Company ABC charges dealers in your state \$500 per month per dealer location. If the dealer wants to use a handheld computer and camera of Company ABC, there is a charge of \$275 per month for these items, in which case the total charge would be \$775 per month.
2. Dealer gets access to ABC.com (website), inventory management, lead management, (e.g. all inquiries on the website go first to Company ABC who then directs them to the dealer for dealer to read and respond to inquiries, dealer can change prices, delete

trucks, etc.), and the ability to print window labels and buyer's guides, which the dealer prints on its printer.

3. If dealer wants to purchase window labels or buyer guides from Company ABC, part of the labels and guides will be printed by Company ABC and mailed to the dealer. The dealer is billed an additional amount for these items. The dealer then prints the truck specifications on the label and buyers guides.

B. Questions:

1. In Fact 1, is the (1) \$500 payment, or (2) \$775 payment by the dealer to Company ABC subject to your state's sales or use tax?
2. In Fact 1, are Company ABC's purchases of the handheld computers and cameras subject to your state's sales or use tax? (Note: When Company ABC purchases these handheld computers and cameras, it first obtains possession of these items in STATE and they are then shipped to the dealer in your state if they wish to use them for the charge of \$275 per month).
3. In Fact 3, is the charge by Company ABC to the dealer for the window labels and buyer guides subject to your state's sales or use tax?
4. If Company ABC's only transactions in your state are as described above for Transaction C, does Company ABC have nexus in your state for (1) sales and use taxes, and (2) income taxes?

IV. Transaction D: Reseller:

A. Facts:

1. XYZ in your state can access Company ABC's web site (which is private-labeled for XYZ).
2. XYZ provides dealers with access to their inventory. XYZ has access to all of his customers (i.e. dealers)
3. XYZ bills the dealers for the services it provides to them.
4. XYZ pays Company ABC \$300 per dealer per month. For example, if XYZ had 10 dealer customers, XYZ would pay Company ABC \$3,000 per month (10 x \$300).

B. Questions:

1. In Fact 4, is the payment by XYZ to Company ABC subject to your state's sales or use tax?
2. If Company ABC's only transactions in your state are as described above for Transaction D, does Company ABC have nexus in your state for (1) sales and use taxes, and (2) income taxes?

V. Transaction E: Reseller/Web/Equipment:

A. Facts:

1. Individuals (who are not employees of Company ABC) contact dealers in your state to sell the services of Company ABC.
2. Interested dealers will contact Company ABC regarding the services.

3. Company ABC offers two types of services: (1) access to Company ABC's website, (with no equipment furnished to the dealer), and (2) access to Company ABC's website and the use of Company ABC's handheld computer and camera.
4. For each dealer who purchases one of Company ABC's services as a result of the contact of the individual in Fact 1, Company ABC will pay the individual a fee.
5. A dealer who receives access to the website, with no use of Company ABC's handheld computer and camera, will be charged a fee by Company ABC.
6. A dealer who receives access to the website and the use of Company ABC's handheld computer and camera, will be charged a higher fee by Company ABC.

B. Questions:

1. In Fact 4, is the fee paid by Company ABC to the individual subject to your state's sales or use tax?
2. In Fact 5, is the amount paid by the dealer to Company ABC subject to your state's sales or use tax?
3. In Fact 6, is the all or part of the amount paid by the dealer to Company ABC subject to your state's sales or use tax? If only part is taxable, what part is taxable?
4. In Fact 6, are the purchases of the handheld computer and camera by Company ABC subject to your state's sales or use tax?
5. If Company ABC's only transactions in your state are as described above for Transaction E, does Company ABC have nexus in your state for (1) sales and use taxes, and (2) income taxes?

Please email your response to me. Also, please mail me any booklets which explain who needs a permit, what's taxable and exempt, etc and an application for a permit. Thanks for your assistance.

DEPARTMENT'S RESPONSE:

In response to your letter-ruling request, the following background on the Illinois Service Occupation Tax, Use Tax, and nexus may be helpful to aid you in a determination of your client's tax liabilities.

Service Occupation Tax:

Retailers' Occupation Tax and Use Tax do not apply to receipts from sales of personal services. Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. If tangible personal property is not transferred, tax is not incurred. For your general information please see 86 Ill. Adm. Code Part 140 regarding sales of service and Service Occupation Tax. These regulations may be found on the Department's internet website under the heading of "Laws/Regs/Rulings."

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon how

the serviceman calculates his or her liability. There are four ways that the tax can be calculated: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on the cost price if they are registered de minimis servicemen; or, (4) Use Tax on the cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. Upon selling their product, they are required to collect the corresponding Service Use Tax from their customers. See 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See 86 Ill. Adm. Code 140.101(f). This class of registered de minimis servicemen are authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers. See 86 Ill. Adm. Code 140.108.

The final method of determining tax liability may be used by de minimis servicemen not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. Those servicemen are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. Those servicemen are also not liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction-by-transaction basis. See 86 Ill. Adm. Code 140.109.

Use of property in this State:

Use Tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer. See 35 ILCS 105/1 et seq. In addition, the State of Illinois taxes leases differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See 86 Ill. Adm. Code 130.220 and 130.2010. As end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax

liability. The lessors would either pay their suppliers, if their suppliers were registered to collect Use Tax, or would self-assess and remit the tax to the Department. If the lessors already paid taxes in another state with respect to the acquisition of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. See subsection (a)(3) of 86 Ill. Adm. Code 150.310.

Nexus:

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your client's company would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations. Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient "nexus" with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the out-of State retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis will trigger Use Tax collection responsibilities. See Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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